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No. 10-728

In the Supreme Court of the United States

RALPH NADER; PETER MIGUEL CAMEJO; ROBERT H. STIVER; MICHAEL A. PEROUTKA; CHUCK BALDWIN; DAVID W. PORTER,
Petitioners,

v.

KEVIN B. CRONIN, Chief Election Officer, State of Hawaii,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 30, 2010

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QUESTIONS PRESENTED ON CERTIORARI

1. Whether Hawaii's statutory schema requiring small parties act as independent candidates during the heat of a Presidential election in order to obtain ballot access, and whether Hawaii's election laws discriminating against all independent campaigns in the state, requiring approximately 5.5 times as many signatures for independent candidates to obtain ballot access as compared to the signatures required for minor political parties' ballot access, constitutes a severe or disparate burden under the equal protection clause of the Fourteenth Amendment to the United States Constitution, when the effect of such laws kept two nationally prominent independent and small party campaigns off the Hawaii ballot in the 2004 Presidential election?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Plaintiffs-Appellants-Petitioners

Ralph Nader;

Peter Miguel Camejo;

Michael Peroutka;

Chuck Baldwin;

David W. Porter;

Robert H. Stiver;

Defendant-Appellee-Respondent

Kevin B. Cronin.

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The Opinion of the United States Court of Appeals for the Ninth Circuit is published at 620 F.3d 1214. A copy of the Opinion is included in the Appendix A at 1a-10a. The district court issued an unpublished Opinion on Summary Judgment that can be found via a Westlaw citation of 2008 WL 336746. A copy of the Opinion is included in the Appendix C at 13a-39a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion on September 1, 2010. (App. A, at 1a.) This Petition for Writ of Certiorari is filed within 90 days the Ninth Circuit's Decision. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendments reads in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws."

The relevant Hawaii statutes at issue in this case, Haw. Rev. Stat. § 11-62 and Haw. Rev. Stat. § 11-62, are set forth in the Appendix in full.

STATEMENT OF THE CASE

The Nature of the Case

This is a case involving the alleged violation of civil and constitutional rights. Plaintiffs-Appellants Ralph Nader, Peter Miguel Camejo, Michael Peroutka, and Chuck Baldwin were independent candidates for the Offices of President and Vice-President.[1] ((R. 57-9, Decl. of Robert H. Stiver, at ¶ 2)[2] (attached as Exhibit 6 to the Affidavit of Eric A. Seitz, R. 57-3); (R. 57-10, Affidavit of David W. Porter, at ¶ 2) (attached as Exhibit 7 to the Affidavit of Eric A. Seitz, R. 57-3).) These candidates sought, with the assistance of Plaintiffs-Appellants David W. Porter and Robert H. Stiver, and were denied access to the 2004 ballot because the Defendant Kevin B. Cronin's ("Cronin") predecessor-in-office[3] determined that the candidates presented an insufficient number of signatures to qualify for the presidential ballot as independents, which was the only means they could access the ballot

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[1] The Plaintiffs-Appellants will be referred to collectively as ("Nader") in this brief. Furthermore, Peter Camejo died on September 13, 2008.

[2] Citations to the record will utilize the following citation form: "(R. XX.)" with the "XX" referring to the document number on the district court document.

[3] Cronin's predecessor was Dwayne D. Yoshina who left office since the filing of the Complaint. The Defendant was sued in his official capacity and, consequently, Cronin maintains defense of the suit in his name. In this brief, the Defendant will be referred to as "Cronin" whether or not Mr. Yoshina actually did the act or held office at the time of the act.

under Hawaii's laws at the time of their campaigns. (R. 57-9, at ¶ 6; R. 57-10, at ¶ 6.)

Course of the Proceedings.

On October 8, 2004, a Complaint was filed alleging: first, that the statutes requiring a substantially higher number of signatures to place an independent candidate on the ballot compared to the small number of signatures to place a political party and consequently, its partisan candidates on the ballot violated the First, Fifth, and Fourteenth Amendments to the Constitution; and, second, that Cronin arbitrarily and capriciously rejected valid signatures submitted on behalf of the candidates therefore violating the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution. (R. 1.) The case was stayed on October 28, 2005 to allow the Hawaii Supreme Court to adjudicate a case on its docket. (R. 30.) The stay was lifted on November 1, 2007. (R. 50.)

On December 4, 2007, Cronin filed a motion to dismiss on summary judgment. (R. 53 and 54.) Nader opposed this motion and filed a cross-motion for summary judgment on January 10, 2008. (R. 56 and 57.) Cronin filed a reply in support of his motion for summary judgment on January 17, 2008. (R. 60 and 61.) A hearing was held on January 28, 2008 at which time the Court granted Cronin's motion for summary judgment as to Count One, but denied Cronin's motion for summary judgment as to Count Two. (R. 65.) A written Order articulating the reasons for the summary judgment order was issued on February 7, 2008. (App. C, at 13a; R. 68; 2008 WL 336746.)

Count Two was tried to the Court on March 10 and March 11, 2008. (R. 85 and 86.) The Court's findings of fact and conclusions of law and decision was issued on May 1, 2008, (R. 92), and Judgment entered on May 2, 2008, (R. 93). A timely Notice of Appeal was filed on May 30, 2008. (R. 94.) Nader only appealed the summary judgment dismissal as to Count One.

The Ninth Circuit, after briefing and oral argument, affirmed the district court's summary judgment order. (App. A, at 1a.)

STATEMENT OF THE FACTS

The Nader/Camejo Campaign.

Ralph Nader and Peter Miguel Camejo were candidates for President and Vice-President, respectively, in the 2004 Presidential race. (R. 57-9, at ¶ 2.) Robert H. Stiver ("Stiver") was a citizen, resident, and registered voter in the State of Hawaii and assisted the Nader/Camejo campaign in the quest for ballot access. *Id.* at ¶¶ 1-3. On September 3, 2004, approximately 5,600 signatures were submitted on behalf of the Nader/Camejo campaign. *Id.* at ¶ 4. Cronin advised Stiver that only 3,124 signatures were valid on September 24, 2004. *Id.* at ¶ 6.

The Peroutka/Baldwin Campaign.

Michael A. Peroutka and Chuck Baldwin were candidates for President and Vice-President, respectively, in the 2004 Presidential race. (R. 57-10, at ¶ 2.) David W. Porter ("Porter") was a citizen, resident, and registered voter in the State of Hawaii and assisted the Peroutka/Baldwin campaign in the

quest for ballot access. *Id.* at ¶¶ 1-3. On September 3, 2004, approximately 7,195 signatures were submitted on behalf of the Peroutka/Baldwin campaign. *Id.* at ¶ 4. Cronin advised Porter that only 3,471 signatures were valid on September 24, 2004. *Id.* at ¶ 6.

Other Facts.

Hawaii Revised Stat. § 11-113 requires independent candidates for President to submit signatures in the amount at least equal to one percent of the votes cast in the prior Presidential election. (R. 54-1, at ¶ 5; R. 61, at ¶ 5.) Because 371,033 votes were cast in the 2000 Presidential election, independent candidates were required to submit at least 3,711 signatures to obtain ballot access. (R. 54-7, Decl. of Dwayne D. Yoshina, at ¶¶ 7-8.) Therefore, the valid signatures submitted by both campaigns were insufficient to obtain ballot access pursuant to Hawaii Revised Statutes § 11-113.

Hawaii Revised Stat. § 11-62 requires new political parties seeking ballot access to submit signatures in the amount at least equal to one-tenth of one percent of the total registered voters as of the last election. (R. 54-1, at ¶ 3; R. 61, at ¶ 3.) Because Hawaii had 676,242 registered voters as of the 2002 general election, political parties were required to obtain 677 signatures to obtain ballot access. (R. 54-7, at ¶¶ 4-5.) Therefore, the valid signatures submitted by both campaigns ***was sufficient*** at least as to the quantity necessary for a political party to obtain ballot access.

The deadlines to submit signatures on behalf of independent candidates and political parties differed. Political parties were required to submit the 677

signatures by April 1, 2004. (R. 54-7, at ¶ 6.) Independent candidates were required to submit the 3,711 signatures by September 3, 2004. (R. 54-7, at ¶ 8.) The election occurred on November 2, 2004 without any of the candidates' names on the ballot. (R. 68, at p. 10.)

ARGUMENT FOR GRANTING WRIT

This Court should grant certiorari to clarify an unsettled area of law and correct the Ninth Circuit's erroneous opinion, which directly contradicts this Court's precedent and conflicts with the Fourth Circuit Court of Appeals. As states invent new and creative ways to hinder independent candidates and campaigns, especially both independent and small party movements emerging in response to the Presidential election, this Court's guidance to states across the country is increasingly necessary, especially as the Circuits apply this court's precedents in conflicting manners. This case concerns an equal protection question involving access to the ballot for late-emerging small parties and independent campaigns, as well as the comparison of the respective burdens on independent candidates and small political parties' access to the ballot.

The regulation of ballot access involves fundamental First Amendment rights. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983). Over the years, when considering equal protection questions involving the ballot access of candidates and political parties, courts applied the *Anderson* balancing test to determine whether the application of strict scrutiny is appropriate. Two lines of cases developed. As to the first line of cases, when an equal protection issue

involves comparing the burdens on minor parties or independents as contrasted to major parties, the Courts recognized the dissimilar status of the two, and imposed a variant of rational basis review.[4] By contrast, when an equal protection issue involves comparing the burdens on independents as contrasted to minor parties, this Court recognized the similarity of status, the historic discrimination against independent campaigns, and applied a variant of strict scrutiny.[5] Notably, this Court has always paid special attention to law protecting late-developing political causes and campaigns, as independent movements or small parties, in response to the Presidential election cycle, given the critical national importance such campaigns historically hold and the essential role they make for our representative democracy. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983).

The Ninth Circuit, as increasingly common across the judicial landscape, deviated from that tradition in the case below. This case alleged Hawaii's laws imposing a signature requirement more than five times higher for independent candidates than for minor and small parties violated the equal protection rights of independents, and, further, violated the ballot

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[4] *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Cromer v. State of South Carolina*, 917 F.2d 819 (4th Cir. 1990) (disapproved of by *Wood v. Meadows*, 117 F.3d 770 (4th Cir. 1997) on other grounds); and, *Greaves v. State Bd. of Elections of North Carolina*, 508 F. Supp. 78 (E.D.N.C. 1980).

[5] *American Party of Texas v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Lubin v. Panish*, 415 U.S. 709 (1974); and, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

access rights of both independent and small parties who emerge in response to a Presidential election, since Hawaii requires small parties organize as independents, with the higher signature requirement, if they emerge in response to the Presidential election during the Presidential election cycle (February or later). Rather than apply a strict scrutiny analysis to the equal protection issue as required by the first line of cases, both the district court and the Ninth Circuit excused the law by applying the least level of election-law scrutiny to Hawaii's laws at issue. This reflects an ongoing concern, voiced by states in earlier petitions for certiorari, of courts applying inconsistent and incongruous standards of review in election law contexts.

Standard of Review

The question of whether a statute is facially unconstitutional is a pure question of law. *See Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). This Court reviews questions of law *de novo*. *See Elder v. Holloway*, 510 U.S. 510 (1994).

Anderson v. Celebrezze, 460 U.S. 780 (1983) is the seminal case governing statutory analysis in election law cases. A reviewing court must "weigh the character and magnitude of the asserted injury to the [Plaintiff's] rights protected by the First and Fourteenth Amendments" against "the precise interests put forth by the State as justification for the burden imposed by its rule." *Id.* at 789. Only after considering these interests and burdens can a reviewing court determine the level of scrutiny.

I. THE DISTRICT COURT AND THE NINTH CIRCUIT ERRED WHEN DETERMINING WHETHER A SEVERE BURDEN ON NADER'S CIVIL AND CONSTITUTIONAL RIGHTS EXISTED BY FAILING TO CONSIDER EACH OF THE TWO STATUTES GOVERNING BALLOT ACCESS BY POLITICAL PARTIES AND INDEPENDENT CANDIDATES IN TANDEM.

Looking first to the district court opinion, the district court failed to properly consider the effect of the totality of the election laws on Nader's equal protection claims. The district court relied on a line of cases which analyzed the respective plaintiffs' burdens and states' interests in equal protection cases involving independent candidates (or minor political parties) as against the two major political parties and ignored a line of cases which analyzed the respective burdens and interests in equal protection cases involving independent candidates as contrasted with minor political parties. Indeed, at oral argument, the Circuit appeared to embrace deliberate discrimination in favor small parties against independents as a permitted policy of a state legislature.

Because the burdens new political parties and independent candidates face in obtaining ballot access are similarly situated, the line of cases holding strict scrutiny applies to equal protection analysis of the relative burdens imposed on obtaining ballot access by new political parties and independent candidates makes logical sense. The district and Circuit court ignored these cases in its legal analysis when ordering summary judgment. This fundamental error resulted in the district court's erroneous conclusion that there

was no severe burden on Nader's First and Fourteenth Amendment rights. The burden was severe and strict scrutiny was appropriate. As will be shown below, the Ninth Circuit adopted several of the district court's erroneous assertions.

A. The Ninth Circuit's Holding That the Additional Signature Requirements Required of Independent Presidential Candidates Are Justified By the Additional Time Given Those Candidates to Submit Their Signatures Does Not Align Well With Statutory History.

The higher signature requirements necessary for the ballot access of independent Presidential candidates (and any late-emerging small party as well), as compared to the ballot access for pre-Presidential campaign small parties is not justified by the additional five months those candidates have to submit their signatures. This is because statutory history belies the claim. Prior to the Hawaii Legislature's enactment of one-tenth of one percent of registered voters in the prior general election requirement for political party ballot access in 1999, *see* Act 205, § 2, Session Laws of Hawaii, Twentieth State Legislature, Regular Session of 1999, R. 57-7 (attached as Exhibit 4 to the Affidavit of Eric A. Seitz), the Hawaii Revised Stat. § 11-62 required signatures totaling a full one percent of the registered voters in the prior general election, *see* Act 34, § 4, Session Laws of Hawaii, Twelfth State Legislature, Regular Session

of 1983, R. 57-6 (attached as Exhibit 3 to the Affidavit of Eric A. Seitz).[6]

After the 1983 Act, the time frames remained the same in all material respects. *Compare* the 1983 Act, §§ 4 and 14 *with* the current versions of HRS §§ 11-62 and 11-113. In 1983, political parties were required to submit their signatures 150 days before the primary election date and independent parties were required to submit their signatures 60 days before the general election. Since 1999, political parties were required to submit their signatures 170 days before the primary election and the independent candidate deadline remained 60 days before the general election.[7] The deadlines are substantially similar before and after 1999.

Before 1999, even though the deadline to submit political party ballot access signatures was approximately five months before independent candidates, political parties also had to submit a substantially higher number of signatures. This is because the denominators used to calculate the necessary signatures for political parties versus

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[6] The 1983 Act and the 1999 Act referred to in this paragraph are included in the district court record at R. 57 and will be referred to as the "1983 Act" and the "1999 Act" elsewhere in this brief.

[7] The respective burdens placed on political parties and independent candidates in relation to each other by the deadlines are substantially similar before and after the 1999 Act notwithstanding the 20-day change to the political party deadline. The deadline change, which occurred at some time between 1983 and 1999 is dwarfed by the 90% reduction in total signatures required to obtain statewide political party ballot access as a result of the 1999 Act.

independent candidates were different. The political party calculation is based on the number of registered voters in the previous general election and the independent presidential candidate calculation is based on the number of votes case in the previous presidential election. Because it is all but guaranteed the number of registered voters will outnumber the number of votes cast in an election (because everyone does not vote), before 1999, independent candidates not only had more time to submit signatures, but also were required to submit less signatures than political parties for ballot access. *Compare* the 1983 Act, §§ 4 and 14 *with* the current versions of HRS §§ 11-62 and 11-113. This pre-1999 system sits well with existing Supreme Court precedent. In 1979, the Supreme Court struck down an Illinois statute based on an equal protection argument that required an independent candidate for mayor to submit more signatures for ballot access than a statewide candidate or political party needed to acquire ballot access. *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (hereinafter "*Socialist Workers Party*").

Socialist Workers Party basically held that the benchmark for determining whether a candidate's (or local political party's) signature requirement violates equal protection is the statewide political party and candidate's ballot access requirements. "The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement." *Id.* at 186 (referring to the statewide ballot-access signature requirement at issue in that case). As the district court in *Socialist Workers Party* held: "Any greater requirement than [the statewide ballot-access

signature requirement] cannot be said to be the least drastic means of accomplishing the state's goals [of restricting ballot access to nominal or frivolous candidacies], and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents." *Socialist Workers Party v. Chicago Bd. of Election Comm'rs*, 433 F. Supp. 11, 20 (N.D. Ill. 1977) (quoted in *Socialist Workers Party*, 440 U.S. at 179). Hawaii's pre-1999 election system did not violate *Socialist Workers Party* because independent candidates were not required to submit signature greater in number than statewide candidates and political parties were required to do.

The Hawaii Legislature, however, thought this too burdensome for new political parties and passed the 1999 Act. The Senate Report and House Report make clear that the purpose of the differences between the signature requirements did not have any relation to the deadlines that were already in place. Rather, the Reports show a conscious decision to re-value (or, in this Court's vernacular, to "determine") the state's "interest in avoiding overloaded ballots in statewide elections" in light of competing policy considerations. *Socialist Workers Party*, 440 U.S. at 186. The legislature refused to extend these protections to independent campaigns and refused to extend these protections to Presidential-campaign small parties. In relevant part the Senate Report and House Report read as follows:

> **The purpose of this bill is to make it easier for a political party to qualify and operate in Hawaii.**

Senate Standing Committee Report 854, J. of the Senate of the Twentieth Legislature of the State of Hawaii, Regular Session of 1999 (emphasis added), R. 57-8 (attached as Exhibit 5 to the Affidavit of Eric A. Seitz).

> **The purpose of this bill is to make it easier for a political party to qualify and operate in Hawaii.**

House Standing Committee Report 1469, J. of the House of Representatives of the Twentieth Legislature, State of Hawaii, Regular Session of 1999 (emphasis added), R. 57-8 (attached as Exhibit 5 to the Affidavit of Eric A. Seitz).

These Reports are clear. Where before the 1999 Act, the statutes were in harmony with Supreme Court precedent and the relative burdens placed on new political parties and independent candidates, the statutes now favored a certain class of political movements (pre-Presidential small parties) while the new schema discriminated against a disfavored class of political movements (independent campaigns and new parties emerging in response to the Presidential primaries), creating an unconstitutionally severe burden on the First and Fourteenth Amendment rights of independent candidates and their supporters, as well as any small party movement emerging in response to the Presidential election. As this Court previously noted, it is political movements emerging in response to Presidential campaigns that both make the most impact and that have been historically subject to the most discriminatory laws. Hawaii joined that unfortunate tradition.

The Ninth Circuit adopted Hawaii's claim in the district court that the difference in the deadlines supported the higher signature requirement, without the state proffering any substantial reason for such disparate treatment. *Nader v. Cronin*, 620 F.3d 1214, 1218 (9th Cir. 2010); App. A, at 7a. This argument is unavailing after a close analysis of the statutory history because the deadlines did not change with the passage of the 1999 Act, nor were they considered by the Legislature. The real reason independent candidates have additional time to submit their signatures is to satisfy the constitutional concerns expressed in *Anderson*, mainly "to serve important safety-valve purposes not adequately served by major party candidacies alone, or by the availability of write-in candidacies." *Cromer v. South Carolina*, 917 F.2d 819 (4th Cir. 1990) (citing *Anderson*, 460 U.S. at 790-94, 799 n.26).

Imposing a higher signature requirement for independent candidates or Presidential-cycle small party movements than required for pre-Presidential political party ballot recognition offends the very precept Anderson established. The later deadline necessary to protect the rights of independents and Presidential cycle new parties is no excuse to make their burden higher and harder than similarly situated, but less impactful, pre-Presidential small parties.

B. Strict Scrutiny Applies to These Statutes Because, When Taken in Context of Each Other, the Higher Signature Requirement for an Independent Candidate In Relation to the Signature Requirement for Statewide Political Party Ballot Access Constitutes a Severe Burden on the Rights of Independent Candidates.

Both the district court and the Ninth Circuit erroneously relied on *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) and the district court relied on several other cases involving the relative burdens placed on candidates for minor political parties and independent candidates as against major political parties. Both the district court and the Ninth Circuit ignored *Socialist Workers Party* and other cases involving the analysis of the relative burdens of independent candidates and minor political parties that consistently find that a severe burden exists.

Jenness and *Socialist Workers Party* are important because both cases involve the constitutionality of a five percent signature requirement for independent candidates' and/or minor political parties' ballot access. How can this Court uphold one five percent requirement as it did in *Jenness* and strike down another states' five percent requirement as it did in *Socialist Workers Party* without looking to the cases for distinguishing facts that support the seemingly opposite holdings? But that is exactly what the district court and the Ninth Circuit did (or failed to do) when it ignored all of the cases factually similar to *Socialist Workers Party*.

1. The District Court and the Ninth Circuit Erroneously Determined That Strict Scrutiny Was Inappropriate By Primarily Relying on Cases That Involved the Comparison of the Rights and Burdens on Independent Parties or Minor Political Parties Versus the Rights and Burdens of Major Political Parties.

Storer established the rule that two facially valid statutes, taken in context with each other, could constitute a severe burden on a person or political party. "The concept of 'totality' is applicable only in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974). This Court's comment regarding the analysis of statutes "in tandem" was done to explain the extent of *Williams v. Rhodes*, 393 U.S. 23 (1968) which established for the first time that election laws should be examined "as a whole." *Williams*, 393 U.S. at 34. Recognizing that States have "broad powers to regulate voting, which may include laws relating to the qualification and functions of electors," *id.*, the court found that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause," *id.* Consequently, in *Storer*, this Court articulated the scope of the "totality" concept by holding it only applies when the challenged statutes are otherwise facially valid, but the effect of their intersection produces "impermissible barriers." *Storer*, 415 U.S. at 737.

In *Storer*, after articulating the "totality" concept, this Court held that the statute in question was "an absolute bar to candidacy" and therefore "[did] not change its character when combined with other provisions of the electoral code." *Id.* It is important to note here that *Storer* was not primarily an equal protection case. The statute at issue in *Storer* was whether it was constitutional for California to require independent candidates to be unaffiliated with any political party for the immediate one year prior to the filing of the declaration of candidacy. *Id.* at 732. This was not an equal protection problem, however, because partisan candidates were similarly barred from filing declarations of candidacy for their current political party if they had been associated with any other political party during the same one-year period. Because the burdens were virtually identical, there was no equal protection problem. *Id.* Thereafter, this Court analyzed the statute for an unconstitutional burden directly and without regard to other statutes: "there is no need to examine the constitutionality of the other provisions of the Elections Code as they operate singly or in combination as applied to these candidates." *Id.* at 736.

The district court and Ninth Circuit in this case missed this fundamental concept. Nader challenged the statutes below under the equal protection clause, and unlike *Storer*, the burdens placed on partisan candidates of new political parties are not virtually identical. Rather, the burdens are substantially different, and consequently, whether a severe burden exists is a question that must be answered by looking at all of the relevant statutes in light of each other. The district court pointed out some minor differences between independent candidates and political parties,

ie. that political parties might be required to hold conventions or primary elections, (R. 68, p. 16; App. C, at 28a), but failed to account for the very practical and material fact that these differences are insignificant when applied to new political parties.[8] This distinction is borne out by the cases relied on by the district court, all of which involved the rights of independent candidates or minor political parties versus major political parties.

At the forefront, is *Jenness*, 403 U.S. at 442, (cited by the district court at App. C, at 31a and the Ninth Circuit at *Nader*, 620 F.3d at 1218; App. A, at 9a), wherein the Supreme Court approved a statute requiring a five percent signature requirement for independent candidate ballot access. The five percent signature requirement was held not to be inherently more difficult than surviving a major party (Democrat or Republican) political presidential primary.

> This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a [Presidential Democratic or Republican] party primary. That is a premise that cannot be uncritically accepted.

Jenness, 403 U.S. at 440.

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[8] Commenting on dangers that are "theoretically imaginable," the *Williams* Court held that "[n]o such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case." *Williams*, 393 U.S. at 33.

See also American Party of Texas v. White, 415 U.S. 767 (1974), (cited by the district court at R. 68, p. 4) (involving the rights of new minor political parties' and independent candidates' ballot access requirements versus major party requirements).[9]

There is one case cited by the district court and the Ninth Circuit that compares the ballot access requirements of independent candidates with the ballot access requirements of minor political parties. That case is *Nader v. Connor*, 332 F. Supp. 2d 982, 987 (W.D. Tex. 2004) (cited in the district court at App. C, at 27a and in the Ninth Circuit at *Nader*, 620 F.3d at 1217; App. A, at 6a). In that case, the Western District of Texas District Court held that for ballot access requiring independent candidates to obtain 64,076 signatures in 62 days compared to 45,540 signatures in 76 days for minor political parties was not a sufficiently severe burden on the independent candidate to warrant strict scrutiny.[10] *Id.* at 986, 989.

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[9] The district court quoted *Lubin v. Panish*, 415 U.S. 709, 718 (1974), (cited at R. 68, p. 15), but the quotation was only favorably citing *American Party of Texas* as a general example of a State's right to impose some reasonable hurdle to gain access to the ballot. The *Lubin* case itself involved whether a state may deny an indigent from the ballot for failing to pay the declaration of candidacy filing fee. The district court's quotation of *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), (cited at R. 68, p. 15-16), was similarly used by *Munro* to support a general example of the State's ability to regulate the ballot by favorably citing *Jenness*. The *Munro* case involved whether Washington's "blanket primary" system (allowing voters to vote across party lines in a primary election) was unconstitutional.

[10] In Texas, the independent candidate must obtain 44% more signatures than a minor party. In Hawaii, the independent

Nader v. Connor, as well as the district court in this case, however, failed to address the significant line of cases holding otherwise, as will be discussed immediately below.

2. *The District Court and the Ninth Circuit Failed to Address a Line of Cases Holding that Strict Scrutiny Applies to the Analysis of Whether a Severe Burden Exists as Between Independent Candidates and Minor Political Parties.*

Nader brought to the district court's and the Ninth Circuit's attention several cases which persuasively hold contrary to *Nader v. Connor*. Just like *Nader v. Connor*, however, the district court failed to address why the reasoning in those cases did not apply to the present scenario. The reasoning in *Nader v. Connor* is not persuasive when held next to the reasoning of *Greaves*, *Cromer*, and *Socialist Workers Party*.

In *Greaves v. State Bd. of Elections of North Carolina*, 508 F. Supp. 78 (E.D.N.C. 1980), the district court dealt with a signature requirement for Presidential independent candidates. Similar to the Hawaii statutes at issue in this case, the independent presidential candidates faced a substantially higher signature requirement for ballot access than the formation of new political parties required. The *Greaves* Court recognized this problem, applied strict scrutiny, *id.* at 80, and rejected the independent party signature requirement, *id.* at 82.

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candidate must obtain 548% more signatures than a minor party – a significantly more severe burden.

> [T]he court notes that North Carolina grossly discriminates against those who choose to pursue their candidacies as independents rather than forming a new political party. A group of voters seeking a place on the ballot as a new party must submit petitions signed by only 10,000 voters, less than one sixteenth the number required of an independent candidate. . . . **The state has asserted no rational basis, much less a compelling interest, for this disparate treatment.**

Id. at 82 (emphasis added).

The factual similarities between this case and *Greaves* should not go unnoticed. In both instances, the independent candidate ballot access signature requirement was compared to the statewide political party ballot access signature requirement. It is also important to note that unlike *Nader v. Connor*, the district court's summary judgment order, and the Ninth Circuit's Opinion, the *Greaves* Order cited relevant portions of *Socialist Workers Party*, which will be discussed below.

The Fourth Circuit has also spoken in a general fashion about the comparative burdens on independent candidates and new political parties in *Cromer v. South Carolina*, 917 F.2d 819 (1990). In *Cromer*, the issue before the court was whether the independent candidate deadline for declaring one's candidacy was unconstitutionally too early. In the course of the Fourth Circuit's discussion, the circuit court made important remarks relevant to consideration of this case.

> [A]s between new (third) party candidacies and independent candidacies, **independent candidacies must be accorded even more protection than third party candidacies.** This flows from the states' heightened interest in regulating the formation of new parties having the potential not possessed by independent candidacies for long-term party control of government, *see Storer v. Brown*, 415 U.S. [at] 745 . . . (1974), in combination with the peculiar potential that independent candidacies have for responding to issues that only emerge during or after the party primary process. *Anderson*, 460 U.S. at 790-92.

Cromer, 917 F.2d at 823.[11]

Cromer's citation to *Storer*, of course, is relevant because that case involved whether a "disaffiliation" rule[12] imposed on independent candidates and new political party candidates alike violated the equal protection clause. *Storer*, 415 U.S. 724. The Fourth Circuit found the concept a relevant predicate to its reasoning in discussing the relative ballot access

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[11] This quotation is also important because one of the main justifications Cronin suggested for the higher signature requirement for independent candidates was the extended time period allowed to obtain the signatures. *See Cromer*, 917 F.2d at 823 (citing *Anderson*, 460 U.S. at 790-94, 799 n.26).

[12] The "disaffiliation" rule at issue in *Storer* barred independent and partisan candidates from running for office if they were officially affiliated with any political party, in the case of independent candidates, or any other political party, in the case of partisan candidates, within the prior year. *Storer*, 415 U.S. at 733-34.

signature deadlines imposed on independent candidates versus new political parties in *Cromer* and it is relevant here when discussing the differences between signature requirements.

The Supreme Court has also spoken on the issue of whether an independent candidate ballot access signature requirement may exceed a statewide political party ballot access requirement for political parties. *See Socialist Workers Party*, 440 U.S. 173. The most reasonable rule to glean from *Socialist Workers Party* is that a statewide signature requirement for new political parties creates a benchmark that the state cannot exceed without violating the candidates' and his or her supporters' voting, associational, and speech rights unless the state can show the regulation is narrowly tailored to promote a compelling state interest. The reason that the statewide signature requirement creates a benchmark is set forth in *Socialist Workers Party*: "The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the [statewide] signature requirement." *Socialist Workers Party*, 440 U.S. at 186. Here, the Hawaii Legislature, like the Illinois Legislature in *Socialist Workers Party* "determined that its interest in avoiding overloaded ballots in statewide elections" was served by requiring political parties to obtain only one-tenth of one percent of the total registered voters. *Id.* That benchmark was broken in this case by requiring independent candidates to obtain 3,711 signatures, but requiring

new political parties to obtain only 677, a difference of almost five-and-one-half times.[13]

In the district court, Cronin suggested that a presidential independent candidate has an additional five months to collect signatures without any explanation of how the minimum quantum of statewide support needs to be 5.5 times as high on September 3 as is required on April 1 for new political parties. The goal of signature requirements is most logically to avoid allegedly frivolous candidacies from cluttering the ballot. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (discussing whether a state must make a particular showing of "actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions.") Yet Cronin failed to articulate why submitting only 677 signatures for a new political party that could possible survive *ad infinitem* and name candidates to the ballot potentially indefinitely is considered sufficient evidence of substantial community support to warrant recognition,

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[13] The fervor presented by President Obama's Presidential campaign this last election cycle only exacerbates the problem going into the 2012 election cycle. As the percentage of registered voters that actually vote increases, the burden on independent candidates increases. In the last election cycle, there were 691,356 registered voters and 456,064 votes cast in the Presidential race in Hawaii. That means the burden on political parties has risen to 692 signatures to achieve ballot access (an increase of only 25 signatures from the 2004 levels or 3.7%), but the burden on independent Presidential candidates will be 4,561 in the 2012 campaign (an increase of 850 signatures or 22.9%). The figures in this footnote are from the Hawaii Secretary of State's "Final Summary Report" found at http://hawaii.gov/elections/results/2008/general/files/histatewide.pdf.

but an independent candidate's 677 signatures is insufficient to warrant a one-time appearance on the ballot.[14] This does not even meet the rational basis test, much less the strict scrutiny test that must be met as to this statute.

Socialist Workers Party controls. In *Socialist Workers Party*, the Supreme Court struck down an Illinois statute requiring signatures totaling 5% of the total number of persons that voted in the previous election to obtain ballot access. In Cook County, there were over 700,000 persons that had voted in the previous election, which, in turn, required independent candidates to collect over 35,000 signatures to qualify for the ballot in the subsequent election. *Socialist Workers Party*, 440 U.S. at 183. Another statute, however, allowed independent candidates to gain ballot access to a statewide office if they obtained 25,000 signatures. *Id.* at 186. The district court in *Socialist Workers Party* succinctly relied on an Eastern District of Arkansas decision as the basis to strike down the statute. *Id.* at 179.

> On the merits of appellees' equal protection challenge, the [district] court found "[no] rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state

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[14] The fact that this case involves the race for President does not warrant a higher signature requirement over and above the statewide threshold for political party ballot access. The Supreme Court has held that a "State has a less important interest in regulating Presidential elections than statewide or local elections because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S. at 795.

> elections, and yet fail to do the same in a lesser unit. *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977). Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents."

Id. (quoting *Socialist Workers Party v. Chicago Bd. of Election Comm'rs*, 433 F. Supp. 11, 20 (N.D. Ill. 1977)).

"The Illinois Legislature has determined that its interest in avoiding overloading ballots in statewide elections is surved by the 25,000-signature requirement. Yet appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Socialist Workers Party*, 440 U.S. at 186. The district court and the Ninth Circuit ignored *Socialist Workers Party* which struck down a five percent signature requirement in its reasoning when it granted summary judgment in favor of Cronin. Rather, both the district court and the Ninth Circuit relied heavily on *Jenness* which upheld a five percent signature requirement, but neither the district court nor the Ninth Circuit distinguished *Jenness* and *Socialist Workers Party*.

"[A] number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer*, 415 U.S. at 737. In *Socialist Workers Party*, the Supreme Court struck down a 5% signature requirement, which under the district court's theory, should have been upheld by *Jenness*, which itself upheld a 5% signature requirement. *Socialist Workers Party* did not overrule

Jenness because the equal protection analysis is different than an isolated challenge to the statute's burdens. Both the district court and the Ninth Circuit failed to consider this fact.

It further is of no consequence that *Socialist Workers Party* was dealing with a geographic subdivision of Illinois and this case involves the same geographic district: a statewide district. The salient fact is that there are different ballot access signature requirements for the same district. Cronin must still set forth a compelling reason, just like *Socialist Workers Party* required, for the higher signature requirement. That will be difficult to do given the fact that Hawaii has a lesser interest in the Presidential election than it does with solely Hawaii intra-state elections. *Anderson*, 460 U.S. at 795.

Because there was no basis to conclude that a higher signature requirement for a Presidential independent candidate is appropriate when compared to statewide pre-Presidential new political parties, the higher signature requirement violates equal protection and summary judgment issued in Nader's favor.

C. No Compelling State interest Justifies These Regulations.

The *Socialist Workers Party* line of cases established strict scrutiny as appropriate when comparing the election regulations of independent candidates to new political parties. *See Greaves*, 508 F. Supp. 78; *Cromer*, 917 F.2d 819; and, *Socialist Workers Party*, 440 U.S. 173. On the other hand, the cases relied on by the district court upholding various election laws involved the comparison of independent

candidates or new or minor political parties to the major established parties. *See American Party of Texas*, 415 U.S. 767; *Jenness*, 403 U.S. 431; *Lubin*, 415 U.S. 709; and, *Munro*, 479 U.S. 189. Indeed, this factual distinction is important because a minor or new political party is much more similar in character to an independent candidate than a major political party. The major political parties control the keys to the ballot because they hold the necessary legislative and executive positions in government to pass laws establishing ballot access rules, and it is the minority interests of both independent candidates and minor parties that are at risk of extinction by severe burdens to ballot access. The district court's reliance on cases analyzing statutes comparing independent party and minor party burdens to the burdens imposed on major political parties and candidates was misplaced. The district court rather should have addressed the cases analyzing statutes imposing relative burdens on independent candidates as against minor political parties. The fact that independent parties and minor political parties are so similar in character justifies the fact that strict scrutiny is consistently applied to the analysis. Therefore, the district court erred by failing to apply strict scrutiny to the statutory analysis.

Here, the first reason posited by Cronin in the district court to justify the higher signature requirement for independent candidates as opposed to new political parties was the fact that independent candidates were different than minor political parties. Of course, neither *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989) and *American Party of Texas v. White*, 415 U.S. 767 (1974), both of which were cited by Cronin to support this idea, (R. 53-3, p. 15), involved statutory schema requiring independent candidates to

obtain 5.5 times as many signatures for ballot access as political parties needed to achieve ballot access recognition statewide.

The second and only other reason posited by Cronin to justify the higher signature requirement was the fact that the deadlines are different. That difference, however, is justified by the unique "safety-valve" aspect independent candidates can provide. *Cromer*, 917 F.2d at 823 (citing *Anderson*, 460 U.S. at 790-94, 799 n.26). Allowing Hawaii to nullify the public policy reasons and constitutional protections promoted by the later independent candidate deadline would constitute a violation of *Anderson*, and consequently cannot be a narrowly tailored justification for the difference in signature requirements.

Similarly, no case cited by the district court, except for *Nader v. Connor*, 332 F. Supp. 2d 982 which Nader has distinguished above, involved a situation where independent candidates were required to get substantially more signatures for ballot access than new political parties. (Of course, Nader understands the district court was only looking for a rational basis justification to support the statute rather than a justification satisfying strict scrutiny.) In fact, the district court actually cited to one case that can only be interpreted to require differences between the signature requirement to be less burdensome for the independent candidate. "A political group becoming a recognized political party and offering to the electorate a slate of candidates is far different than one individual becoming an independent candidate to run for a particular office." *Arutunoff v. Oklahoma State Election Bd.*, 687 F.2d 1375, 1380 (10th Cir. 1982) (cited at App. C, at 30a).

Hawaii's statutory schema retraced an old, and once properly discarded, tradition of imposing the harshest and highest burdens on precisely those political movements most likely to make an impact on the political life of the nation – independent and Presidential cycle small parties candidacies and campaigns emerging in response to the Presidential election cycle. The Ninth Circuit reinvigorated and misapplied this Court's precedents to reinstate such disparate, discriminatory and democracy-defeating traditions.

CONCLUSION

The Ninth Circuit's decision directly contradicts several of this Court's decisions as well as the Fourth Circuit's decision in *Cromer*. Granting certiorari in this case will allow the Court to clear up this unsettled area of the law and settle the circuit split between the Fourth and Ninth Circuits. Above all, it will put to final rest the resurgent major party controlled legislative incentive to discourage and deter precisely those competitors, campaigns and causes most likely to effect them, the political discourse and the political direction in America. Consequently, this Court should grant Plaintiffs' Petition.

Dated: November 30, 2010

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APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16444
D.C. No. 1:04-cv-00611-ACK-LEK

[Filed September 1, 2010]

RALPH NADER; PETER MIGUEL CAMEJO; ROBERT H. STIVER; MICHAEL A. PEROUTKA; CHUCK BALDWIN; DAVID W. PORTER, *Plaintiffs-Appellants,*	)
v.	)
KEVIN B. CRONIN, Chief Election Officer, State of Hawaii, *Defendant-Appellee.*	)

OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
June 17, 2010—Honolulu, Hawaii

Filed September 1, 2010

Before: Betty B. Fletcher, Harry Pregerson, and Richard R. Clifton, Circuit Judges.

Per Curiam Opinion

COUNSEL

Daniel J. Treuden, The Bernhoft Law Firm, Milwaukee, Wisconsin, for the plaintiffs-appellants.

Aaron H. Schuland, Pearl City, Hawaii, for the defendant-appellee.

OPINION

PER CURIAM:

Independent candidates for president, denied access to Hawaii's ballot for the 2004 election, appeal the district court's holding that the relevant provisions governing such access do not violate the Equal Protection Clause or the First and Fourteenth Amendments. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

BACKGROUND

Hawaii law provides two ways for candidates to obtain access to the ballot for the presidential election. Haw. Rev. Stat. § 11-113. An independent, or nonpartisan, candidate must file an application along with a petition "containing the signatures of currently registered voters which constitute not less than one

per cent of the votes cast in the State at the last presidential election" sixty days before the election. *Id.* § 11-113(c)(2). Political parties that have qualified to place candidates on the primary and general election ballots must file a sworn application with the chief election officer 60 days before the general election to have a candidate placed on the ballot. *Id.* § 11-113(c)(1). The application must include the candidate's name and address, a statement that the candidate meets the constitutional requirements for the office, and a "statement that the candidates are the duly chosen candidates of both the state and the national party, giving the time, place, and manner of the selection." *Id.*

Separate and apart from the rules governing placement on the ballot for the presidential election, Hawaii provides a method for parties to achieve "qualified party" status. *Id.* § 11-62. To qualify as a party, the proposed party must submit a petition 170 days before the next primary declaring the intention of the signers to form a statewide political party. *Id.* § 11-62(a). The petition must "[c]ontain the name, signature, residence address, date of birth, and other information as determined by the chief election officer of currently registered voters comprising not less than one-tenth of one per cent of the total registered voters of the State as of the last preceding general election." *Id.* § 11-62(a)(3). After a party has achieved qualified party status by petition for three consecutive general election cycles, the party "shall be deemed a political party for the following ten-year period." *Id.* § 11-62(d). A party can be disqualified, however, if certain conditions are not met. *Id.* § 11-61.

None of the appellants who sought ballot access did so as a member of a party, but rather all followed the procedures for independent candidates. These candidates had to submit petitions with 3,711 signatures, the equivalent of one percent of the 371,003 votes cast in the 2000 presidential election, 60 days before the general election to qualify to appear on the ballot. Ralph Nader and his running mate, Peter Miguel Camejo, submitted 7,184 signatures, of which 3,124 were valid, falling short of the required number. Michael A. Peroutka and his running mate, Chuck Baldwin, also submitted nearly 7,200 signatures. Of those signatures, 3,471 were valid. As a result, although Nader, Camejo, Peroutka, and Baldwin submitted petitions by the date required, none of the candidates met the signature requirements of Hawaii Revised Statute § 11-113. Both the Nader/Camejo and Peroutka/Baldwin campaigns challenged the signature counts through administrative hearings, but did not qualify to appear on the ballot. Before the general election, the appellants appealed the administrative decision in both state court and federal court, the resolution of which is not at issue in this appeal. At the same time, the appellants challenged the constitutionality of the provisions in federal court. The district court rejected these claims, granting summary judgment in favor of Hawaii's Chief Election Officer. The candidates appeal that decision.

DISCUSSION

We review de novo questions of law, including constitutional rulings, resolved on summary judgment. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 689 (9th Cir. 2010).

[1] "The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting U.S. Const. Art. I, § 4, cl. 1). In fulfilling this role, states "invariably impose some burden upon individual voters" in creating election laws. *Id.* "The Supreme Court has held that when an election law is challenged, its validity depends on the severity of the burden it imposes on the exercise of constitutional rights and the strength of the state interests it serves." *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008). In considering a constitutional challenge to an election law, we "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.' " *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Therefore, "the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Id.* (citing *Burdick*, 504 U.S. at 434). "[A]n election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest." *Id.* at 1035 (citing *Burdick*, 504 U.S. at 434). A state may justify election regulations imposing a lesser burden by demonstrating the state has "important regulatory interests." *Id.* (citing *Burdick*, 504 U.S. at 434).

[2] On its own, the burden on independent presidential candidates seeking access to Hawaii's ballot is low. Candidates need obtain the signatures of

only one percent of the number of voters in the previous presidential election. They have until 60 days before the general election to submit the required signatures. We have little trouble concluding that, in isolation, the burden on independent candidates for president and vice-president is minimal. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding requirement that independent candidates demonstrate "a significant modicum of support" by filing a petition with signatures from five percent of the number of voters registered in the last election for the office sought); *see also Am. Party of Texas v. White*, 415 U.S. 767 (1974) (upholding requirement that independent candidates file a petition signed by one to five percent of registered voters depending on the office sought and capping the requirement at 500 signatures for district office); *Nader v. Connor*, 332 F.Supp.2d 982, 987 (W.D.Tex. 2004) ("Requiring that an independent presidential candidate demonstrate that voters equal in number to one percent of those who voted for president in the last presidential election favor placing the candidate on the ballot, does not place an unreasonable burden on the candidate. . . ."), *aff'd* 388 F.3d 137, 137-38 (5th Cir. 2004) (affirming "[e]ssentially for the reasons as well stated in the district court's memorandum opinion").

[3] Appellants argue, however, that we must examine the burden as compared to the burden for qualifying as a party, relying on the disparity in the signature requirements. Independent candidates for president must obtain valid signatures from registered voters totaling one percent of the number of ballots cast in the previous presidential election. Haw. Rev. Stat. § 11-113(c)(2). Groups seeking to qualify as new

parties need signatures from only one-tenth of one percent of all registered voters. *Id.* § 11-62(a)(3).

In previously examining differing treatments of minor and major political parties, we decided that "[i]n determining the nature and magnitude of the burden that [the state's] election procedures impose on the [minor party], we must examine the entire scheme regulating ballot access." *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 761-62 (9th Cir. 1994). "The [appellants] have the initial burden of showing that [the state's] ballot access requirements seriously restrict the availability of political opportunity." *Id.* at 762. Such an analysis is particularly important where, for instance, restrictions on who may sign a petition exist, where the timeframe in which to obtain the signatures is particularly short, or where the deadline for filing the petition is particularly early. Appellants do not rely on any facts along those lines here and, indeed, Hawaii does not impose such restrictions.

[4] Appellants here have failed to show Hawaii's election scheme imposes a severe burden on independent candidates for president even in light of an examination of Hawaii's regulatory scheme as a whole. In arguing otherwise, appellants gloss over important facts. For instance, in addition to qualifying as a party 170 days before the primary, Haw. Rev. Stat. § 11-62, qualified party candidates must show they are "the duly chosen candidates of *both the state and the national party*." *Id.* § 11-113(c)(1) (emphasis added). Moreover, the one percent signature requirement applies only to independent candidates running for president. Other statutory provisions govern independent candidates in state races. The provisions for establishing qualified party status,

however, apply regardless of the office sought. Therefore, even in comparison to the requirements placed on minor party candidates, we cannot say that the burden on independent candidates for president imposes a severe burden. As a result, strict scrutiny does not apply.

[5] Having determined the level of scrutiny we will apply to appellants' claims, we turn now to the specific challenges. The state need demonstrate only a legitimate state interest. *Libertarian Party of Wash.*, 31 F.3d at 763 ("Because there is at most a *de minimis* burden on the Libertarians' constitutional rights, Washington need demonstrate only that its election schedule is rationally related to a legitimate state interest."). The Supreme Court consistently has held that states have "a legitimate interest in regulating the number of candidates on the ballot . . . to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." *Bullock v. Carter*, 405 U.S. 134, 145 (1972). These interests justify Hawaii's one-percent requirement imposed on independent candidates for president.

[6] We find appellants' Equal Protection Clause argument unpersuasive as well. If we assume that the Equal Protection Clause analysis applies — a question that is not without doubt given that partisan and independent candidates are not necessarily "similarly situated," *see Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003) — the appellants' equal protection argument here relies on the premise that Hawaii law imposes a higher burden on independent candidates

for president than on candidates chosen as the nominee of a qualified party. The Supreme Court addressed a similar argument in *Jenness*. Appellants' argument, however, relies on "a premise that cannot be uncritically accepted." *Jenness*, 403 U.S. at 440. As in *Jenness*, Hawaii has created alternative means for obtaining access to the presidential ballot that are not "inherently more burdensome." *See id.* at 441, *See Erum v. Cayetano*, 881 F.2d 689, 695 (9th Cir. 1989), *overruled on other grounds as recognized in Lightfoot v. Eu*, 964 F.2d 865, 868 (9th Cir. 1992). Therefore, Hawaii's scheme does not violate equal protection. *See Jenness*, 403 U.S. at 440-41 ("We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths [winning the primary of a political party, or circulating nominating petitions as an independent candidate], neither of which can be assumed to be inherently more burdensome than the other."). Accordingly, Hawaii's regulatory scheme governing access to the presidential ballot does not violate the Equal Protection Clause.

CONCLUSION

Because independent presidential candidates are not affiliated with any party, they cannot receive their party's nomination or be asked to show support from a national party. Hawaii therefore has imposed a reasonable one percent signature requirement on independent candidates who wish to appear on the presidential ballot. The one percent signature requirement does not impose a severe burden on independent candidates for president either alone or in comparison to the route qualified party candidates must take. Nor does this scheme run afoul of the Equal

Protection Clause. Therefore, we affirm the district court's holding that Hawaii's presidential ballot access scheme is constitutional.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case: CIV. NO. 04-00611 ACK-LEK

[Filed May 2, 2008]

RALPH NADER, PETER MIGUEL CAMEJO, ROBERT H. STIVER, MICHAEL A. PEROUTKA, CHUCK BALDWIN, AND DAVID W. PORTER,	)
Plaintiff(s),	)
V.	)
KEVIN B. CRONIN, Chief Election Officer, State of Hawaii	)
Defendant(s).	)

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✔] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of the Defendant on all counts pursuant to the "FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION" filed on May 1, 2008.

May 2, 2008
Date

SUE BEITIA
Clerk

/s/
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 04-00611 JMS/LEK

[Filed February 7, 2008]

RALPH NADER, PETER MIGUEL CAMEJO, ROBERT H. STIVER, MICHAEL A. PEROUTKA, CHUCK BALDWIN, and DAVID W. PORTER,	)
Plaintiffs,	)
vs.	)
KEVIN B. CRONIN, Chief Election Officer, State of Hawaii,	)
Defendant.	)

ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT; AND (2) DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs sought inclusion on the Hawaii general election ballot as independent candidates for president and vice-president in the 2004 election, but were denied ballot access because Dwayne Yoshina, former Chief Election Officer for the State of Hawaii,[1] determined that they had not obtained the required number of petition signatures for inclusion on the ballot. Plaintiffs challenged the procedures used in reviewing the petition signatures in both state and federal court. Plaintiffs' state court action is currently pending before the Hawaii Supreme Court. In their federal action, Plaintiffs also challenge as unconstitutional Hawaii Revised Statutes ("HRS") § 11-113, which requires that independent candidates for president obtain a minimum number of signatures to petition for inclusion on the general election ballot.

Defendant seeks summary judgment and/or dismissal of Plaintiffs' claims, while Plaintiffs request summary judgment on Count II. The court held a hearing on the motions on January 28, 2008. Based on the following, the court GRANTS in part and DENIES in part Defendant's motion and DENIES Plaintiffs' motion.

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[1] Yoshina retired as the Chief Election Officer on March 1, 2007. Office of Elections employee Rex Quedilla served as the Interim Chief Election Officer until the State of Hawaii Election Commission appointed Kevin B. Cronin as the Chief Election officer effective February 1, 2008. Cronin is substituted as the defendant in this action pursuant to Federal Rule of Civil Procedure 25(d).

II. BACKGROUND

A. Ballot Requirements for Presidential Candidates in Hawaii

A presidential candidate can be listed on the general election ballot in Hawaii in one of two ways: (1) a qualified political party can designate its candidate; or (2) an individual can petition to be listed, by submitting a petition signed by at least one percent of the number of votes cast in the previous presidential election. Under HRS § 11-113(c):

> All candidates for President and Vice President of the United States shall be qualified for inclusion on the general election ballot under either of the following procedures:
>
> (1) In the case of candidates of political parties which have been qualified to place candidates on the primary and general election ballots, the appropriate official of those parties shall file a sworn application with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election, which shall include:
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> (A) The name and address of each of the two candidates;
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> (B) A statement that each candidate is legally qualified to serve under the provisions of the United States Constitution;
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> (C) A statement that the candidates are the duly chosen candidates of both the state and the national party, giving the time, place, and manner of the selection.

(2) In the case of candidates of parties or groups not qualified to place candidates on the primary or general election ballots, the person desiring to place the names on the general election ballot shall file with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election:

(A) A sworn application which shall include the information required under paragraph (1)(A) and (B), and (C) where applicable;

(B) A petition which shall be upon the form prescribed and provided by the chief election officer containing the signatures of currently registered voters which constitute not less than one per cent of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

1. Political Party Candidates and New Political Parties

In order to be listed under the first provision as a party's candidate, a political party must be qualified under the requirements set forth in HRS §§ 11-61 through 11-64. Any group of persons wishing to qualify as a new political party must file a petition for qualification by 4:30 p.m. on the one hundred

seventieth day prior to the next primary, *see* HRS § 11-62(a)(1), which contains "the name, signature, residence address, date of birth, and other information as determined by the chief election officer of currently registered voters comprising *not less than one-tenth of one per cent* of the total registered voters of the State as of the last preceding general election." HRS § 11-62(a)(3) (emphasis added). The petition must also "[b]e accompanied by the names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules[.]" HRS § 11-62(a)(4). Once a group has been qualified as a political party for three consecutive general elections by petition, or pursuant to HRS § 11-61(b),[2] the group is "deemed a political party for

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[2] HRS § 11-61(b) states in part:

> (1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraph (2) whose terms had expired. This does not include those offices which were vacant because the incumbent had died or resigned before the end of the incumbent's term; and
> (2) The party received at least ten per cent of all votes cast:
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> (A) For any of the offices voted upon by all the voters in the State; or
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> (B) In at least fifty per cent of the congressional districts; or
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> (3) The party received at least four per cent of all the votes cast for all the offices of state senator statewide; or
> (4) The party received at least four per cent of all the votes cast for all the offices of state representative statewide; or
> (5) The party received at least two per cent of all the votes cast for all the offices of state senate and all the offices of state representative combined statewide.

the following ten-year period." HRS § 11-62(d).

As of the 2002 general election, there were 676,242 registered voters in Hawaii. Yoshina Decl. ¶ 4. The signature requirement to qualify as a political party for the 2004 election was therefore 677. Yoshina Decl. ¶ 5. The deadline to file a petition to qualify as a political party was April 1, 2004. Yoshina Decl. ¶ 6.

2. Independent Candidates

Non-party candidates must file their petition by 4:30 p.m. on the sixtieth day prior to the general election. HRS § 11-113(c)(2). The petition must contain:

> the signatures of currently registered voters which constitute *not less than one per cent* of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

HRS § 11-113(c)(2)(b) (emphasis added).

In the 2000 presidential election, 371,003 votes were cast in Hawaii. Yoshina Decl. ¶ 7. An independent candidate for president in 2004 would therefore need 3,711 petition signatures. Yoshina Decl. ¶ 8. The deadline for filing independent candidate petitions was September 3, 2004. Yoshina Decl. ¶ 9.

3. Petition Review Procedures

Petitions submitted to qualify as a new political party under HRS § 11-62 are verified by the Chief Election Officer under procedures set forth in Hawaii Administrative Rules ("HAR") §§ 2-51-53 and 54, while independent candidate petitions are reviewed under HAR §§ 2-51-112 and 113.

Under HAR § 2-51-112, the Chief Election Officer first determines "whether the signatory is an active registered voter by checking the statewide voter registration system," ("SVRS"). Further, under HAR § 2-51-113(b):

> (1) If the signatory on the petition exists as an active registered voter in the statewide voter registration system, then the signatory shall be counted;
> (2) If the signatory on the petition does not exist as an active registered voter in the statewide voter registration system, then the signatory shall not be counted;
> (3) If there are duplicate signatories on a party petition, and the signatory is an active registered voter, then the signatory shall be counted once; and
> (4) If the signatory does not provide all of the required information on the petition or if the information is not legible, then the signatory may not be counted.

The Chief Election Officer "may verify that the voter's signature on the petition corresponds with the voter's signature on the voter's registration form. If the signature does not correspond, then the voter's sig

nature on the petition shall not be counted." HAR § 2-51-113(d).

B. The 2004 Presidential Election

In 2004, Plaintiffs Ralph Nader ("Nader") and Peter Camejo ("Camejo"), and Michel Peroutka ("Peroutka") and Chuck Baldwin ("Baldwin") sought inclusion on the general election ballot as independent candidates for president and vice-president. Robert Stiver ("Stiver") represented the Nader/Camejo campaign, while David Porter ("Porter") was the Hawaii coordinator for the Peroutka/Baldwin campaign.

On September 3, 2004, Stiver and Porter filed with the Office of Elections signed petitions on behalf of the Nader/Camejo and Peroutka/Baldwin campaigns for inclusion on the general election ballot. On September 20, 2004, the Office of Elections informed Porter and Stiver that the petitions did not contain the required number of valid signatures.[3] After further proofing the calculations, on September 24, 2004, the Office of Elections notified Stiver that "the correct total is 3,124 valid signatures which is 587 signatures less that the 3,711 valid signatures needed to qualify to place the names of Ralph Nader for President and Peter Miguel Camejo for Vice President on the general election ballot." Def.'s Ex. 3. On the same day, Porter was notified that the Peroutka/Baldwin campaigns "correct total is 3,471 valid signatures which is 240 signatures

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[3] Defendant's September 20, 2004 letter to Stiver stated that of the 7,184 signatures submitted, "3,672 were valid and 3,512 were invalid." Def.'s Ex. 1. The letter to Porter said that 7,195 signatures had been submitted, and "of these 3,481 were valid and 3,714 were invalid." Def.'s Ex. 2.

less than the 3,711 valid signatures required." Def.'s Ex. 4.

On September 23, 2004, Stiver requested an administrative hearing to contest and review the Office of Election's decision. The hearing commenced on September 29, 2004, but prior to concluding, the Nader/Camejo campaign entered into a settlement agreement which provided that the petition signatures would be reviewed again in the presence of a representative of the campaign, the campaign representative would be allowed to flag signatures the campaign believed should have been counted as valid, and then Yoshina would review the challenged signatures and make a final decision. *See* Def.'s Ex. 5. The Nader/Camejo recount began on October 7, 2004. On October 18, 2004, the Office of Elections issued its findings that the Nader/Camejo campaign fell 373 signatures short of the required 3,711 signatures, and would not be included on the ballot. Def.'s Ex. 7.

The Peroutka/Baldwin campaign requested an administrative hearing on September 24, 2004, which was commenced on September 30, 3004. Yoshina acted as the hearing officer, and issued a decision on October 5, 2004 concluding that the Peroutka/Baldwin campaign had not obtained enough valid signatures and was not eligible to be placed on the ballot. Def.'s Ex. 6.

Plaintiffs filed a Complaint in this court on October 8, 2004. Count 1 of the Complaint alleges that the Hawaii laws requiring more petition signatures for independent candidates than for new political parties violates the First and Fourteenth Amendments of the Constitution. Compl. ¶¶ 19-20. Plaintiffs' Count II

claims that Defendant "arbitrarily and capriciously failed and/or refused to count and/or consider the names of valid signatories on the petitions presented by Plaintiffs." Compl. ¶ 22. On October 11, 2004, Plaintiffs filed a Motion for Preliminary Injunction, followed by a Motion for Temporary Restraining Order on October 12, 2004. On October 13, 2004, United States District Judge David Alan Ezra denied Plaintiffs' motions for a temporary restraining order and preliminary injunction. Doc. No. 9.

On October 18, 2004, Plaintiffs appealed the administrative decisions to the state Circuit Court. Judge Sabrina McKenna heard both cases on November 1, 2004 and affirmed the administrative decisions that day. The general election took place on November 2, 2004. Judge McKenna issued written decisions on November 23, 2004, and on April 13, 2005, Plaintiffs filed a joint notice of appeal to the Hawaii Supreme Court. By October 11, 2005, all of the briefing was submitted in Plaintiffs' appeal of the state court proceedings.

On October 28, 2005, the parties entered a stipulation to stay proceedings in the instant federal action pending resolution of Plaintiffs' appeal to the Hawaii Supreme Court. This court lifted the stay on November 1, 2007.

On December 4, 2007, Defendant filed a Motion to Dismiss or in the Alternative For Summary Judgment. Defendant seeks summary judgment as to Count I and asks the court to abstain from considering Count II, which is related to Plaintiffs' state court appeal, pursuant to *Younger v. Harris*, 401 U.S. 37 (1971).

Plaintiffs filed an opposition and cross-motion for summary judgment on January 10, 2008. Plaintiffs seek summary judgment as to Count II on the grounds that: (1) the practices and procedures used to determine the validity and sufficiency of petition signatures is unconstitutional and not based on any credible evidence; and (2) because Yoshina served as the administrative hearing officer, Plaintiffs were denied a fair hearing before an impartial and objective hearing officer.

As the court stated at the January 28, 2008 hearing, the court GRANTS Defendant's motion as to Count I and DENIES the motion as to Count II. The court also DENIES Plaintiffs' cross-motion for summary judgment as to Count II.

III. STANDARD OF REVIEW

A party is entitled to summary judgment as to any claim where there is no genuine issue as to any material fact contained in the pleadings, depositions, answers to interrogatories, admissions or affidavits. Fed. R. Civ. P. 56(c). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). When reviewing a motion for summary judgment, the court construes the evidence -- and any dispute regarding the existence of facts -- in favor of the party opposing the motion. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1086 (9th Cir. 2001). The moving party bears the initial burden of showing that there is no factual dispute regarding those claims for which summary judgment is sought. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th

Cir. 1987). Nevertheless, "summary judgment is mandated if the non-moving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case.'" *Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir. 1999) (*quoting Celotex*, 477 U.S. at 322).

IV. ANALYSIS

The court first addresses Count I of Plaintiffs' Complaint, which alleges that HRS § 11-113 violates (1) the First and Fourteenth Amendments of the Constitution, and (2) the Equal Protection Clause of the Fourteenth Amendment of the Constitution. The court then addresses Plaintiffs' Count II claims challenging the procedures used to review the petitions.

A. First and Fourteenth Amendments

1. Legal Framework

The level of scrutiny applied to the state's ballot -access requirements depends on the extent to which the challenged regulation burdens First and Fourteenth Amendment rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The court weighs the character and magnitude of the injury to the rights protected by the First and Fourteenth Amendments against the state's interests in justifying the requirements imposed by its election laws. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

If the state's requirements severely restrict those rights, the requirements may be upheld only if they are narrowly tailored to advance a compelling state

interest. *Burdick*, 504 U.S. at 434. On the other hand, if the law imposes reasonable, non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions imposed. *Id.*

2. HRS § 11-113 Is Not Unconstitutional

With respect to the character and magnitude of the injury to Plaintiffs' rights, courts have recognized that "restrictions upon the access of independent candidates to the ballot impinge on the fundamental rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively." *Erum v. Cayetano*, 881 F.2d 689, 692 (9th Cir. 1989); *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). The court weighs these rights against the state's asserted interests in avoiding voter confusion and an overcrowded ballot.

It is well established that states have "a legitimate interest in regulating the number of candidates on the ballot." *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *see also id.* ("In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) ("[W]e have approved the States' interests in avoiding voter confusion, ballot overcrowding, or the presence of frivolous candidacies, in seeking to assure that

elections are operated equitably and efficiently. . . ." (citations and quotation signals omitted)).

Courts have repeatedly held that signature requirements are reasonable preconditions to having one's name on a ballot. In *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), the Court upheld Georgia's requirement that independent candidates demonstrate "a significant modicum of support" by filing a petition signed by five percent of the total registered voters in the last election for the office sought by the candidate. "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot-the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.* Of the five percent signature requirement, the Court observed, "[t]he 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." *Id.* (footnote omitted).

In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Court upheld a Texas provision that required independent candidates to file a petition signed by three to five percent of registered voters depending on the office sought, although in no event would candidates for any "district office" be required to file more that 500 signatures. The Court held that:

> requiring independent candidates to evidence a "significant modicum of support" is not unconstitutional. Demanding signatures equal in number to 3% or 5% of the vote in the last election is not invalid on its face, *see Jenness v. Fortson*, *supra*, and with a 500-signature limit in any event, the argument that the statute is unduly burdensome approaches the frivolous.

Id. at 789 (footnote omitted). *See also Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office."); *Nader v. Connor*, 332 F. Supp. 2d 982, 987 (W.D. Tex. 2004) ("Requiring that an independent presidential candidate demonstrate that voters equal in number to one percent of those who voted for president in the last presidential election favor placing the candidate on the ballot, does not place an unreasonable burden on the candidate and satisfies the state's legitimate interest in assuring itself that the candidate is a serious contender truly independent, and with a satisfactory level of community support." (citation, quotation signals, and brackets omitted)).

Although groups seeking to form a new political party need only obtain signatures of one-tenth of one percent of voters – 677 signatures in 2004 -- political

parties are subject to different requirements not applicable to independent candidates, including filing the petition by April 1, 2004 (as opposed to September 3, 2004 for independent candidate petitions). *See* HRS § 11-62. Further, political party candidates may be subject to primary elections or party conventions, while independent candidates' names are placed directly on the ballot upon submission of a valid petition.[4] As a result, courts have repeatedly upheld laws providing different requirements for independent and political party candidates. *See, e.g.*, *Erum*, 881 F.2d at 693-94 (upholding a Hawaii requirement that non-partisan candidates for county office receive 10% of the votes cast in a primary or at least as many as the least favored successful partisan candidate, whereas partisan candidates could be on the general election ballot simply by receiving the greatest number of votes in their party primary, with no minimum vote requirement); *Nader*, 332 F. Supp. 2d at 988 ("More

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[4] Additional factors also limit the burden imposed by the one percent signature requirement. Unlike some states, Hawaii voters signing independent candidate petitions are not restricted from voting in the primaries. *See Jenness v. Fortson*, 403 U.S. 431, 438-39 (1971) (noting that "Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions [and allows] a voter who has signed the petition of a nonparty candidate to participate in a party primary"). Voters may also sign as many petitions as they like, *see id.*, and Hawaii does not require independent candidates to have been previously unaffiliated with a political party, *see Storer v. Brown*, 415 U.S. 724, 726 (1974) (upholding statute that imposed such a requirement), or compel independent or minor party candidates to file an affidavit regarding their views. *See Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 446 (1974) (striking statute requiring minor parties to sign loyalty oath before being placed on the ballot).

restrictive signature and deadline requirements for an independent candidate may be justified if the ballot-access requirements, as a whole, are reasonable and similar in degree to those for a minor political-party candidate."); *Stevenson v. State Bd. of Elections*, 638 F. Supp. 547, 554 (N.D. Ill. 1986) (upholding disparities in ballot access requirements between parties and independents).

In sum, the State's one percent signature requirement for independent candidates is a reasonable restriction, and not sufficiently severe to warrant strict scrutiny. Because HRS § 11-113(c) imposes reasonable, non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters and candidates, Hawaii's important regulatory interests in avoiding voter confusion and overcrowded ballots sufficiently justify the restrictions imposed.

B. Equal Protection[5]

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[5] Although there is substantial overlap between the analysis of Plaintiffs' First and Fourteenth Amendment claims and their equal protection claims, the court separates the equal protection portion of its discussion for organizational clarity. As the Ninth Circuit explained in *Erum v. Cayetano*, 881 F.2d 689, 694 n.11 (9th Cir. 1989):

> We note that substantial analytical overlap exists between those challenges brought to ballot access restrictions under the first and fourteenth amendments and those brought under the equal protection clause. Indeed, the Court has relied on cases in the former category to decide those in the latter, and vice-versa. *See, e.g., Anderson*, 460 U.S. at 786 n.7, 103 S. Ct. at 1569 n. 7 ("In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in

With respect to Plaintiffs' equal protection challenge to the election laws, the "Equal Protection Clause ensures that 'all persons similarly situated should be treated alike.'" *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (*quoting City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). Independent and political-party candidates are not similarly situated with respect to the State's election laws. *See Storer v. Brown*, 415 U.S. 724, 745 (1974) ("A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office."); *Arutunoff v. Oklahoma State Election Bd.*, 687 F.2d 1375, 1380 (10th Cir. 1982) ("A political group becoming a recognized political party and offering to the electorate a slate of candidates is far different than one individual becoming an independent candidate to run for a particular office."); *Nader*, 332 F. Supp. 2d at 989-90 ("Differing requirements may be justified when the candidates are not similarly situated, thereby rendering statutory restrictions reasonable and nondiscriminatory even when there is a disparity between the requirements for independent and minor

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a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment"); *see also* G. Gunther, Constitutional Law at 823 (11th ed. 1985).

Nevertheless, while we follow the Court's trend of relying on both lines of cases to analyze either kind of challenge, we separate out the equal protection portion of our discussion for the purpose of preserving analytical clarity.

political-party candidates. Equal protection requires that similarly situated individuals should be treated alike. . . . When the individuals are not similarly situated, however, they need not be treated alike. Thus, a disparity among the level of the restrictions can be upheld as reasonable and nondiscriminatory."); *Stevenson*, 638 F. Supp. at 554 (observing that party candidates create an entire party platform, run with a slate of candidates, and have responsibilities which extend beyond those contemplated by an independent).

In any event, Plaintiffs' right to equal protection is not violated here. The Ninth Circuit held in *Erum*, 881 F.2d at 695, that "the different requirements Hawaii imposes for placement on the general ballot between so-called new party candidates and independent candidates" do not amount to invidious discrimination. *Erum* states:

> For example, new parties, before they can be recognized as such and have candidates appear under their name on the primary ballot, must successfully complete certain tasks. Haw. Rev. Stat. § 11-62. These differences are, like those upheld in *Jenness*, related to distinct processes, neither of which is inherently more burdensome than the other. Thus, they do not run afoul of the equal protection clause.

Id. (footnote omitted). *See also Jenness*, 403 U.S. at 440-41 ("This [equal protection] claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. That is a premise that cannot be uncritically accepted. . . . He

may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other." (footnotes omitted)).

The requirements imposed upon independent candidates for president in Hawaii do not run afoul of the First and Fourteenth Amendments or equal protection. The court GRANTS Defendant's motion for summary judgment as to Count I.

C. Count II: Validity of State's Petition Review Procedures

As to Count II, Defendant requests that the court abstain from deciding issues currently pending before the Hawaii Supreme Court, while Plaintiffs seek summary judgment on the merits of their claims.[6]

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[6] As addressed at the January 28, 2008 hearing, the issues raised in Count II are not moot. The petition review procedures employed during the 2004 general election have not been modified and remain in effect. Although the 2004 general election was held without including the Nader/Camejo or Peroutka/Baldwin tickets on the Hawaii ballot, Plaintiffs' challenge falls within the "capable of repetition yet evading review" exception to the mootness doctrine. *See Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000) (holding that where the election laws in question remain in effect, a plaintiff has standing to challenge them as a member of the class of people affected by the presently written statute, and the case is not moot); *see also Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983) ("If [election law] cases were rendered moot

1. Abstention

Defendant asks the court to abstain from considering Plaintiffs' claims currently pending before the Hawaii Supreme Court based on *Younger v. Harris*, 401 U.S. 37 (1971). "Abstention by a district court is required under *Younger* when three criteria are satisfied: (1) State judicial proceedings are ongoing; (2) The proceedings implicate important state interests; and (3) The state proceedings provide an adequate opportunity to raise federal questions." *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007) (citation and quotation signals omitted).

Defendant fails to establish that *Younger* abstention is applicable under the circumstances. In *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), the court considered what types of state court proceedings were applicable under *Younger*. *NOPSI* notes that because *Younger* "involved a facial First Amendment-based challenge to the California Criminal Syndicalism Act, we held that absent extraordinary circumstances federal courts should not enjoin pending state criminal prosecutions." *Id.* at 364. *NOPSI* goes on to explain that, although *Younger* has been extended beyond state criminal prosecutions, it does not apply to all state court proceedings:

> Although our concern for comity and federalism has led us to expand the protection of *Younger* beyond state criminal prosecutions, to civil

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by the occurrence of an election, many constitutionally suspect election laws . . . could never reach appellate review.").

> enforcement proceedings, and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions, *it has never been suggested that Younger requires abstention in deference to a state judicial proceeding reviewing legislative or executive action*. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.

Id. at 367-688 (citations omitted; emphasis added). The Ninth Circuit has interpreted *NOPSI* as "[m]aking clear that the mere existence of parallel proceedings is not sufficient but that the class of case matters . . . *Younger* does not apply to a state judicial proceeding that is reviewing legislative or executive action[.]" *Gilbertson v. Albright*, 381 F.3d 965, 974 (9th Cir. 2004) (en banc); *see id.* at 977 ("[A] state proceeding which is nonjudicial or involves the interpretation of completed legislative or executive action is not of that character.").

Younger has been extended to two types of civil actions: (1) "quasi-criminal (or at least 'coercive') state civil proceedings and even administrative proceedings brought by the state as enforcement actions against an individual," and (2) "those situations uniquely in furtherance of the fundamental workings of a state's judicial system." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 69 (1st Cir. 2005); *see also NOPSI*, 491 U.S. at 367-68 (*Younger* has been expanded to "civil enforcement proceedings" and "civil proceedings involving certain orders that are uniquely

in furtherance of the state courts' ability to perform their judicial functions.").[7]

Neither of these is implicated here. There is no civil enforcement action brought by the state; instead, Plaintiffs sued Defendant in an effort to overturn state laws and procedures as applied to them during the 2004 elections. Nor are the fundamental workings of the state's judicial system in play. Rather, Plaintiffs' state court action is accurately characterized as judicial review of executive a tion.

To the extent Count II challenges completed administrative hearings (i.e. executive action), Plaintiffs' suit does not represent "the interference with ongoing judicial proceedings against which *Younger* was directed." *NOPSI*, 491 U.S. at 372. The court DENIES Defendants motion a s to Count II.

2. Plaintiffs' Cross-Motion For Summary Judgment

Plaintiffs argue that the procedures used by the Office of Elections in reviewing the petitions and

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[7] *See also Green v. City of Tucson*, 255 F.3d 1086, 1094 (9th Cir. 2001) (en banc), *overruled on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (en banc), (observing that *Younger* is ordinarily restricted "to circumstances in which the state court proceeding is an enforcement action against the federal court plaintiff, and is not met simply by the prospect that the federal court decision may, through claim or issue preclusion influence the result in state court"); *Fresh Intl Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1360 n.8 (9th Cir. 1986) ("*Younger* abstention ordinarily would not apply when a federal plaintiff also is the plaintiff in state court.").

verifying signatures were unconstitutional and that they were not provided a fair administrative hearing because Yoshina acted as the hearing officer. The court addresses each claim in turn.

a. Petition review and signature verification

Plaintiffs claim that the Office of Elections erred in its review of the petitions because: (1) it only attempted to identify a signatory by the name listed on the petition, rather than cross-referencing by address or date of birth; (2) it rejected signatures as illegible without making a serious effort to decipher names; and (3) it rejected signatures if the address listed on the petition did not exactly match the address in the SVRS. As a result of these procedures, Plaintiffs claim that Defendant's determination that they did not obtain enough valid signatures was arbitrary, capricious, and not based on credible evidence.

Whether the Office of Elections cross-referenced the signatures, rejected signatures as illegible without making a serious effort to decipher names, or on the basis that the address listed on the petition did not exactly match the address in the SVRS are questions of fact that cannot be resolved on the current record. The administrative record is not before the court, and the court has no way of determining whether the Office of Elections, in fact, cross-referenced the signatures, failed to make a serious effort to decipher names, or rejected signatures if the address on the petition did not match the SVRS. Plaintiffs fail to show that there are no genuine issues of fact and do not to meet their burden on summary judgment.

b. Impartial hearing officer

Lastly, Plaintiffs claim that because Yoshina first determined that the Peroutka/Baldwin campaign's petition did not contain the required number of signatures, it was improper for him to later serve as the hearing officer at the administrative hearing challenging the decision. Plaintiffs argue that Yoshina was, in effect, reviewing his own previous decisions.

Under HRS § 11-113(e), the Chief Election Officer is empowered to convene an administrative hearing, but the statute does not establish who must serve as the hearing officer:

> If the applicant, or any other party, individual, or group with a candidate on the presidential ballot, objects to the finding of eligibility or disqualification the person may, not later than 4:30 p.m. on the fifth day after the finding, file a request in writing with the chief election officer for a hearing on the question. A hearing shall be called not later than 4:30 p.m. on the tenth day after the receipt of the request and shall be conducted in accord with chapter 91. A decision shall be issued not later than 4:30 p.m. on the fifth day after the conclusion of the hearing.

In the context of state administrative proceedings, the Hawaii Supreme Court has held that, "[w]hether a particular decision-making procedure is constitutionally defective for want of impartiality will depend on many factors . . . , [including] the character of the decision being made, the nature of the individual and governmental interests at stake, and the

feasibility of alternative procedures." *Sifagaloa v. Bd. of Trs. of Employees' Ret. Sys.*, 74 Haw. 181, 191, 840 P.2d 367, 372 (1992) (citations and quotation signals omitted). In fact, "[a]n appearance of impropriety does not occur simply where there is a joinder of executive and judicial power." *Id.*

Sifagaloa held that "[a]dministrators serving as adjudicators are presumed to be unbiased," and that this presumption "can be rebutted by a showing of disqualifying interest." *Id.* at 192, 840 P.2d at 372. *See also Rollins v. Massanari*, 261 F.3d 853, 857-58 (9th Cir. 2001) ("ALJs and other similar quasi-judicial administrative officers are presumed to be unbiased. This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification . . . . [Plaintiff] was required to show that the ALJs behavior, in the context of the whole case, was so extreme as to display clear inability to render fair judgment." (citations and quotation signals omitted)).

Based on the record presented to the court, Plaintiffs fail to make the required showing of a disqualifying interest. *See Sifagaloa*, 74 Haw. at 192, 840 P.2d at 372 ("[T]he burden of establishing a disqualifying interest rests on the party making the assertion."). Plaintiffs fail to meet their burden on summary judgment with respect to this claim.

In sum, the court DENIES Plaintiffs' cross-motion for summary judgment as to Count II.

V. CONCLUSION

The court GRANTS Defendant's motion for summary judgment as to Count I and DENIES the motion as to Count II. The court also DENIES Plaintiffs' cross-motion for summary judgment as to Count II. Plaintiffs claims in Count II remain for trial on March 4, 2008.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 7, 2008.

[SEAL]

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

Nader v. Cronin, Civ. No. 04-00611 JMS/LEK, Order (1) Granting in Part and Denying in Part Defendant's Motion to Dismiss or in the Alternative for Summary Judgment; and (2) Denying Plaintiffs' Cross-Motion for Summary Judgment

APPENDIX D

Division 1. Government
Title 2. Elections
Chapter 11. Elections, Generally
Part V. Parties

HRS § 11-62

§ 11-62. Qualification of political parties; petition

Currentness

(a) Any group of persons hereafter desiring to qualify as a political party for election ballot purposes in the State shall file with the chief election officer a petition as provided in this section. The petition for qualification as a political party shall:

(1) Be filed not later than 4:30 p.m. on the one hundred seventieth day prior to the next primary;

(2) Declare as concisely as may be the intention of signers thereof to qualify as a statewide political party in the State and state the name of the new party;

(3) Contain the name, signature, residence address, date of birth, and other information as determined by the chief election officer of currently registered voters comprising not less than one-tenth of one per

cent of the total registered voters of the State as of the last preceding general election;

(4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules; and

(5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any other political party. All objections shall be made not later than 4:30 p.m. on the twentieth business day after the petition has been filed. The chief election officer may extend the objection period up to an additional ten business days, if the group of persons desiring to qualify as a political party is provided with notice of extension and the reasons therefor. If no objections are raised by 4:30 p.m. on the twentieth business day, or the extension thereof, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the objection or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing.

(d) Each group of persons desiring to qualify as a political party, having first qualified as a political party by petition under this section, and having been qualified as a political party for three consecutive general elections by petition or pursuant to section 11-61(b), shall be deemed a political party for the following ten-year period. The ten-year period shall begin with the next regularly scheduled general election; provided that each party qualified under this section shall continue to field candidates for public office during the ten-year period following qualification. After each ten-year period, the party qualified under this section shall either remain qualified under the standards set forth in section 11-61, or requalify under this section 11-62.

Credits

Laws 1970, ch. 26, § 2; Laws 1973, ch. 217, § 1(p); Laws 1983, ch. 34, § 4; Laws 1986, ch. 323, § 2; Laws 1993, ch. 304, § 4; Laws 1997, ch. 287, § 2; Laws 1998, ch. 33, § 1; Laws 1999, ch. 205, § 2.

Notes of Decisions (6)
Current with amendments through 2010 Regular and Special Sessions.

Hawaii Revised Statutes
Division 1. Government
Title 2. Elections
Chapter 11. Elections, Generally
Part VIII. Ballots

HRS § 11-113

§ 11-113. Presidential ballots

Currentness

(a) In presidential elections, the names of the candidates for president and vice president shall be used on the ballot in lieu of the names of the presidential electors, and the votes cast for president and vice president of each political party shall be counted for the presidential electors and alternates nominated by each political party.

(b) A "national party" as used in this section shall mean a party established and admitted to the ballot in at least one state other than Hawaii or one which is determined by the chief election officer to be making a bona fide effort to become a national party. If there is no national party or the national and state parties or factions in either the national or state party do not agree on the presidential and vice presidential candidates, the chief election officer may determine which candidates' names shall be placed on the ballot or may leave the candidates' names off the ballot completely.

(c) All candidates for president and vice president of the United States shall be qualified for inclusion on

the general election ballot under either of the following procedures:

(1) In the case of candidates of political parties which have been qualified to place candidates on the primary and general election ballots, the appropriate official of those parties shall file a sworn application with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election, which shall include:

(A) The name and address of each of the two candidates;

(B) A statement that each candidate is legally qualified to serve under the provisions of the United States Constitution;

(C) A statement that the candidates are the duly chosen candidates of both the state and the national party, giving the time, place, and manner of the selection.

(2) In the case of candidates of parties or groups not qualified to place candidates on the primary or general election ballots, the person desiring to place the names on the general election ballot shall file with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election:

(A) A sworn application which shall include the information required under paragraph (1)(A) and (B), and (C) where applicable;

(B) A petition which shall be upon the form prescribed and provided by the chief election officer containing the signatures of currently registered voters which constitute not less than one per cent of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

Prior to being issued the petition form, the person desiring to place the names on the general election ballot shall submit a notarized statement from each candidate of that person's intent to be a candidate for president or vice president of the United States on the general election ballot in the State of Hawaii. Such statements may be withdrawn by a prospective candidate for vice president and an alternative candidate for vice president be substituted anytime prior to the notification of qualification or disqualification provided in subsection (d). Any such substitutions shall be accompanied by a notice of substitution satisfying subparagraph (A), a statement of intent as required by this paragraph, and a letter by the candidate for president endorsing the substitute candidate for vice president. Upon receipt of a notice of substitution and all other required documents, the substitute shall replace the original candidate for vice president on the general election ballot. The petitions issued in the names of the original candidates will remain valid for the purposes of this section.

(d) Each applicant and the candidates named, shall be notified in writing of the applicant's or candidate's

eligibility or disqualification for placement on the ballot not later than 4:30 p.m. on the tenth business day after filing. The chief election officer may extend the notification period up to an additional five business days, if the applicants and candidates are provided with notice of the extension and the reasons therefore.

(e) If the applicant, or any other party, individual, or group with a candidate on the presidential ballot, objects to the finding of eligibility or disqualification the person may, not later than 4:30 p.m. on the fifth day after the finding, file a request in writing with the chief election officer for a hearing on the question. A hearing shall be called not later than 4:30 p.m. on the tenth day after the receipt of the request and shall be conducted in accord with chapter 91. A decision shall be issued not later than 4:30 p.m. on the fifth day after the conclusion of the hearing.

Credits

Laws 1970, ch. 26, § 2; Laws 1973, ch. 217, § 1(ff); Laws 1977, ch. 189, § 1(8); Laws 1983, ch. 34, § 14; Laws 1993, ch. 304, § 6.

Notes of Decisions (8)

Current with amendments through 2010 Regular and Special Sessions.